



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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Memorandum

Date: January 20, 2023

To: Richard Conescu, Chair, & Members, Zoning Board of Adjustment

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Governor's Hill Corp (petitioner/owner)** - Appeal from an Administrative Decision issued on December 13, 2022 that determined a newly installed (2022) leach field shall adhere to the Town's 20' property line setback despite being installed on a legal nonconforming lot of record. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-03.

The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

Background & Project Description

If the Board has already granted either the variance in Case 2023-01 or the Equitable Waiver in Case 2023-06, then this petition is unnecessary and should be either withdrawn by the petitioner or deemed moot by the Board.

Map 6D, Lot 104 is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. The lot is approximately 0.637 acres and is serviced by municipal water (MVD) and a private septic system. The lot is surrounded by residential uses and also abuts Reeds Ferry Elementary School.

Subject of Petitioner's Appeal

The petitioner is challenging staff's determination that the newly constructed on-site septic disposal field is subject to the setback requirements of Section 3.02.4 of the ordinance.

The petitioner's argument in the submitted materials references language in Section 3.06, which he interprets as NH state regulatory requirements (requiring a 10 foot setback) superseding the requirements of Section 3.02.4 (requiring a 20 foot setback).

Staff has consistently interpreted this section (3.02.4) of the ordinance by reading the plain language (emphasis added):

3.02.4 - Location of On-Site Disposal Fields

An on-site disposal field shall not be located less than 20' from any property line. All on-site disposal systems in every zoning district shall be placed in the least severe soil on the lot, or as determined by the Building Official. Existing septic systems which have failed or

need to be replaced which do not meet the existing 20' setback requirement may be replaced in the current location provided the septic system is not enlarged nor encroaches further into the setback requirement and is approved by the New Hampshire Department of Environmental Services.

The petitioner's argument that Section 3.06 allows state regulations to "supersede" is actually the reverse of the language's intent in our reading/interpretation. Section 3.06 reads:

3.06 - Lots Without Public Sewerage

Notwithstanding compliance of any lot with the requirements set forth in Section 3.02 or Section 3.05, no residence shall be constructed on any lot which is not served by public sewerage facilities unless private sewage disposal system absorption area requirements can be and are met to the satisfaction of the Building Official, said area requirements to be determined by the Building Official in accordance with the provisions contained in the NH Department of Environmental Services' ENV-WQ1000 Administrative Rules, as most recently amended.

Furthermore, Section 3.06 does not directly reference Section 3.02.4, only Section 3.02 (The Table of Lot and Yard Regulations) and Section 3.05 (Nonconforming Lots). Staff is confident that the ordinance has been properly interpreted.

Standard of Review:

Pursuant to RSA 676:5, appeals may be taken by any person aggrieved by any decision of an administrative officer involving construction, interpretation or application of the terms of the ordinance. Under RSA 674:33 (I)(a), the Zoning Board of Adjustment has the power to, among other things, hear and decide appeals if it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16.

Staff wants to remind the Board that an Appeal of Administrative Decision is the only type of petition for which the Board sets a precedent. Unlike a variance or special exception (which is a decision based only on the particulars of the individual parcel of land), overturning an administrative decision requires staff to modify, moving forward, how the particular section of the ordinance is interpreted across all applicable parcels in the community.

- Should the Board have already voted to grant the variance in Case 2023-01 or the Equitable Waiver in Case 2023-06, this Appeal of Administrative Decision should be withdrawn by the petitioner. If not withdrawn, it must be determined to be moot, and no further action is necessary by the Zoning Board of Adjustment because the petitioner will have already obtained the relief required.
- Should the Board have already voted to deny both the variance in Case 2023-01 and the Equitable Waiver in Case 2023-06, then the Board would need to vote on this appeal:
 - Should the Board vote to grant the Administrative Appeal (and overturn the Community Development Staff's determination), the petitioner would be able to have the new septic field remain in the required setback. ***If this is the decision made, the Zoning Board would require that staff allow for all septic fields be permitted within the state regulation's required setbacks, ignoring the 20' setback from***

Section 3.02.4 for all new septic fields without relief from the dimensional requirements of the Zoning Ordinance in any instance.

- Should the Board vote to deny the Administrative Appeal (and uphold the Community Development Staff's determination), the petitioner's septic field would be in violation, and the design would need to be revised to comply with the setback requirements (*again, this is assuming that this petition even is heard by the Board, which would only be the case if both the variance or Equitable Waiver are denied*).

Ec: Governor's Hill Corp., petitioner
Eli Leino, Bernstein Shur
Building Department Staff
Fire Prevention Staff
Assessing Department Staff
Cc: Zoning Board File